Raley's Inc. *and* United Food & Commercial Workers Union, Local 373, United Food & Commercial Workers International Union, AFL–CIO–CLC. Case 20–CA–24332

August 9, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

Limited exceptions filed to the judge's decision in this case[1] present the issue of whether the remedial notice should be posted at each of the Respondent's retail outlets.

The National Labor Relations Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Raley's Inc., Fairfield, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] On November 18, 1992, Administrative Law Judge Clifford H. Anderson issued the attached decision. The Respondent filed limited exceptions to the judge's recommended remedy requiring the Respondent to post the notice at all of its facilities, and the General Counsel filed a letter in response to the exceptions.

[2] The Respondent did not except to the judge's finding that its dress code rule which prohibited the wearing of unapproved union insignia and union buttons violated Sec. 8(a)(1) of the Act. Further, the Respondent did not except to the judge's finding that its dress code rule applied to its employees at all of its stores.

Under these circumstances, the Respondent was obligated to establish special circumstances justifying the rule at any or all of its stores. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945); *Kendall Co.*, 267 NLRB 963, 965 (1983). The Respondent failed to make such a showing either at the hearing or in its exceptions. Accordingly, contrary to the Respondent's contention, the judge was warranted in requiring the Respondent to post the notice to employees at all locations where the unlawful rule has been or is in effect. *Albertsons, Inc.*, 300 NLRB 1013 fn. 2 (1990); *Kinder-Care Learning Centers*, 299 NLRB 1171, 1176 (1990). See also *Postal Service*, 303 NLRB 463 fn. 5 (1991).

Boren Chertkov, Esq., for the General Counsel.
John J. Baruch, Labor Relations Associate Food Employers Council, Inc., of San Ramon, California, for the Respondent.
Richard G. McCracken, Esq. (Davis, Coswell & Bowe), of San Francisco, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

CLIFFORD H. ANDERSON, Administrative Law Judge. I heard this case in trial on July 21, 1992, in Fairfield, California, pursuant to a complaint and notice of hearing issued by the Regional Director for Region 20 of the National Labor Relations Board (the Board) on December 27, 1991, based on a charge filed on November 12, 1991, and docketed as Case 20–CA–24332 by United Food and Commercial Workers Union, Local 373, United Food & Commercial Workers International Union, AFL–CIO (the Charging Party or the Union) against Raley's Inc. (Respondent). Posthearing briefs were due on September 25, 1992.

The complaint as amended at the hearing, and further amended thereafter by posthearing order granting the General Counsel's motion to withdraw certain allegations, alleges that Respondent has maintained a rule prohibiting its employees from wearing trade union buttons unless approved by it and, further, has disparately and selectively enforced the rule. The complaint alleges this conduct violates Section 8(a)(1) of the National Labor Relations Act (the Act). Respondent admits the existence and enforcement of a uniform dress code including a rule governing the wearing of union buttons, but alleges both that the rule is permissible under the Act and that it has not been inconsistently applied.

FINDINGS OF FACT

All parties were given full opportunity to participate at the hearing, to introduce relevant evidence, to call, examine and cross-examine witnesses, to argue orally, and to file posthearing briefs.

On the entire record herein, including posthearing briefs from the General Counsel and Respondent, and from my observation of the witnesses and their demeanor, I make the following[1]

I. JURISDICTION

At all times material, Respondent has been a corporation with an office and place of business in Fairfield, California, where it has been engaged in the operation of a retail grocery store. Respondent as part of its business operations annually enjoys revenues in excess of $500,000 and annually purchases and receives goods or services directly from outside the State of California of a value in excess of $50,000. Respondent is therefore an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Respondent operates a retail grocery store chain with over 50 supermarkets in northern California including the supermarket at issue herein which is located in Fairfield, California (the Fairfield store or the store). The Union along with other constituent locals of the United Foods & Commercial Workers International Union, AFL–CIO (the International)

[1] As a result of the pleadings and the stipulations of counsel and other representatives at the trial, there were few disputes of fact regarding collateral matters. Where not otherwise noted, the findings herein are based on the pleadings, the stipulations of the parties, or unchallenged credible evidence.

represents a unit of retail food store employees which includes certain employees of Respondent's Fairfield, California store. The employers whose employees are within the unit are represented for purposes of collective bargaining by Food Employers Council, Inc., a multiemployer association, of which Respondent is a member. The Food Employers Council and the Union have negotiated a series of collective-bargaining contracts covering the unit employees including one effective from March 1, 1989, through February 28, 1992. A separate multiple employer unit of retail meatcutter employees is represented by various locals of the International, not including the Union. Those locals negotiate with the Employers Council, Inc. on behalf of various employers concerning these employees in independent negotiations. The Fairfield store's meat department employees are in this separate unit.

Respondent announced changes in its employee dress code which apparently applied to its employees at all its stores including all its Fairfield store employees in December 1988. These new rules took effect in June 1989. The dress code, which applies to employees ''while on duty'' requires unit employees, inter alia, to wear standardized apparel.[2] The dress code further noted: ''Only Raley's or Raley's approved pins are allowed.'' On or about August 25, 1989, Respondent posted a notice to employees which stated:

> As outlined in our new Dress Code policy, wearing of buttons is prohibited by Raley's. This includes union buttons. There will be no exceptions.

There was no evidence that any union button has ever been approved by Respondent at anytime.

B. *Evidence Respecting the Wearing of Buttons and Pins at Respondent's Fairfield Store and Respondent's Response Thereto*

1. Union buttons

In September 1991, the Union's sister locals were either in or approaching negotiations with Food Employers Council respecting a new meatcutter contract. Peter Rockwell, the Union's business representative, testified without contradiction:

> And during the meat cutter negotiations in September [1991], I believe was the beginning of the button campaign. We had meat cutter and clerks locals all around the area ordering buttons which said solidarity works and urging their members to wear them in the stores as a sign of solidarity between clerks and meat cutters in the lead up to meat cutter negotiations, during meat cutter negotiations.

Rockwell testified further that in September 1991 he distributed various union buttons[3] to Fairfield store employees and thereafter had occasion to observe the employees wearing the buttons. Subsequently he noticed that the employees were no longer wearing the buttons and was told that management was not allowing the buttons to be worn. Rockwell spoke to Store Manager Rich Paper who told him the ''Solidarity Works'' buttons were not allowed by Respondent.

Rich Paper testified that in the fall of 1991 he observed Rockwell pass out the union buttons to meatcutter employees in one of the employees' breakrooms and observed the employees put them on. Paper testified he told the employees that they had to remove the buttons which they did. Paper testified that Rockwell thereafter asked him what Respondent's policy was respecting the union buttons and he told Rockwell the buttons were not approved by Respondent.

By letter dated October 23, 1991, the Union asked Respondent to approve Fairfield store employees wearing the ''Solidarity Works'' button. By letter dated November 5, 1991, Respondent denied the request.

Various employees whose testimony was either uncontradicted or corroborated by Paper testified that during this period they wore one of the four buttons involved at the Fairfield store and were told either by Paper directly or by others at Paper's admitted instruction to remove all union buttons and insignia. There is no dispute that Respondent required one or more of its employees to remove each of the four buttons or pins identified above under color of Respondent's dress policy no button rule. There is also no dispute that in requiring the removal of the buttons and pins, the employees were told only that the dress policy no button rule required the pin's removal or that the button or pin was unapproved and therefore must be removed. No contention was made that further explanations were conveyed to employees respecting why, when, or where such buttons must be removed.

2. Other buttons and pins

Fairfield store checker, Victoria Scopesie, testified that she regularly wore various decorative pins and adornments while working without ever obtaining prior approval from management or being told not to wear or to remove any particular item. Produce Manager Douglas Caluya testified that he ob-

[2] Respondent's dress code establishes uniform dress among certain employee job classifications including employees in both the retail clerk unit and the meatcutter unit. For example male retail produce employees wear knee length green bib aprons, white shirts, ties, dark slacks, and dark shoes. Females cashiers wear brown smocks with red and green stripes, white blouses or shirts, dark slacks or skirts, and dark shoes. The required aprons and smocks are provided by Respondent; the other items of clothing are provided by the individual employees. All unit employees are required to wear Respondent's standard format name badge.

[3] Four buttons or pins were described in testimony and placed in evidence. First, is the ''Solidarity Works'' button, which is circular, approximately the size of a half dollar coin and bears the word ''solidarity'' in white on one line and the word ''works'' in red on a second line immediately below—all on a black background.

Second is the ''Union Yes'' pin which is an approximately three-fourth inches wide by five-eighth inches high rectangle with a white enameled background framed in gilt. The pin has two lines of print. The first bears the word UNION in blue letters outlined in gilt with a small circled ''AFL–CIO'' symbol in substitution for the letter ''O'' in the word UNION. The pin's second line bears the word YES in red letters outlined in gilt followed by a gilt box bearing a black check mark in apparent simulation of the marking of an election ballot.

The third pin is simply the four cutout letters ''UFCW'' outlined in gilt on a black background joined together and measuring approximately seven-eighth inches in length and one-fourth inch in height. The fourth pin or service pin is a dime-sized gilt and enamel pin bearing the International's logo and a small red 15 or 20 in the center designating years of membership in the organization.

served checker employees wearing buttons bearing the photographs of baseball little league players during the period at issue without objection by management. Store Manager Paper testified that he simply had not observed the various pins and adornments allegedly worn by Scopesie and others and, had he seen them, he would have required their removal unless they were within the general themes permitted by Respondent as described below.

There was no dispute that employees are regularly encouraged to wear and do wear promotional buttons, signs, and logos of various sizes and colors in augmentation of particular product promotions then being held in the store. Thus, for example, a tree pin was worn by employees to support Respondent's promotion of Nut Tree Ice Cream. California Lotto pins prepared by Respondent were worn to encourage the sale of lottery chances. Various adhesive signs or messages are stuck to employes' clothing promoting particular products on sale at the store. So, too, the employees' wearing of seasonal theme pins or other adornments is allowed or even encouraged by Respondent without requiring specific prior approval of given items to be worn for such celebrations as Christmas, Halloween, and Valentine's day. Indeed on Halloween Eve and a few other occasions, Respondent's dress code is put in abeyance and employee costumes are encouraged in support of seasonal themes. Further, on special occasions, Respondent has allowed or encouraged employee wearing of particular items. For example, by memorandum dated January 28, 1991, Respondent allowed employees to wear American Flags or yellow ribbons in support of the Desert Storm military campaign.

C. *Analysis and Conclusions*

1. General union button law under the Act

The Board with Court approval has long held the wearing of union buttons or insignia activity protected under Section 7 of the Act absent ''special considerations,'' *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945); *Control Services*, 303 NLRB 481 (1991). See also the historical discussion in *Nordstrom, Inc*., 264 NLRB 698, 700 (1982). The Court in *Republic Aviation*, supra, 324 U.S. at 798–799, characterized the analysis involved in such cases as one of

> working out an adjustment between the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments.

The Board has evolved a substantial body of law on the question. The cases deal with a variety of ''special circumstances'' offered to justify restriction on the wearing of union buttons by employees. Obscene or derogatory material may be denied protection. Language which improperly incites or causes disruption or results in an adverse impact on production may be barred in certain circumstances. The burden of proof respecting the existence of special circumstances which justify prohibition or limitation of union buttons is on the employer who seeks to justify the limitation of employees' Section 7 rights.

As set forth in greater detail, infra, the Board and courts have also considered the argument that certain employers have a business interest in preserving their employees' uniformity of appearance when they are dealing with the public. Such interests may be a factor supporting the limitation of union insignia. *Nordstrom*, supra. In evaluating such arguments, the Board considers whether the employer has in fact strictly limited the wearing of similar adornments. *Albertsons, Inc*., 300 NLRB 1013 (1990). Further the cases require that any rule justified under such a rationale not be overboard and prohibit the wearing of buttons in areas outside the public eye. *Albertsons, Inc*., 272 NLRB 865 (1984).

2. Arguments of the parties

Initially the General Counsel attacks Respondent's dress code union button prohibition[4]

> because, on its face, it is overly broad. Respondent's policy applies to employees everywhere on Respondent's facility, including noncustomer areas such as the employee breakroom. Such as overly broad rule violates Section 8(a)(1) of the Act. *Mack's Supermarkets, Inc*., [288 NLRB 1082 (1988)]; *Brunswick Food and Drug*, 284 NLRB 663, 638–4 (1987); *Alert Medical Transport*, [276 NLRB 631 (1985)]; *Page Avjet Corp*., 275 NLRB 773, 776–777 (1985); *Albertson's Inc*., 272 NLRB 865, 866 (1984). [The G.C. Br. at 9–10.]

Respondent argues on brief at 16:

> The Employer's Dress Code Policy, as it refers to the prohibition of wearing Union buttons, is reasonable since it applies solely to employees during working hours. There is no evidence in the case at bar that the rule has been applied to non-selling areas nor is there any evidence that the rule as been applied to employees during nonworking time.

The General Counsel cites the appropriate cases for the proposition that Respondent must demonstrate special circumstances to justify its prohibition. Respondent defends its rule based on two special circumstances. Initially Respondent notes that only some employees attempted to wear the ''Solidarity Works'' buttons and, accordingly, it may be fairly inferred that others did not wish to wear it and therefore there

> were divergent opinions amongst the employees in the Employer's Fairfield store with respect to supporting the Union's attempt to have employees wear the ''Solidarity Works'' button while at work. [R. Br. at 17.]

Thus the argument is that the prohibition avoids employee dissension and disruption.

Second, Respondent argues on brief at 18:

> [T]he Employer has a legitimate business right to maintain a uniform dress code which will attract and retain customers so that the business can increase profits and

[4] Respondent's dress policy's requirement that employees first obtain Respondent's permission to wear union buttons and pins coupled with the fact that such permission was without exception withheld by Respondent renders the rule at issue herein for purposes of this analysis the same as an outright ban or prohibition on union buttons and insignia. If restrictions on buttons are inappropriate, prior approval is equally wrong, *Middletown Hospital Assn*., 282 NLRB 541, 552–553 (1985).

> expand its operations. The expansion of the Employer's business is directly related to productivity and customer satisfaction. The dress code is grounded in a legitimate concern for the Employer's business and in no way interferes with the employee' right under the Act.

Respondent cites two cases supporting this proposition: *Burger King Corp. v. NLRB*, 725 F.2d 1053 (6th Cir. 1984), and *Hertz Rent-A-Car*, 305 NLRB 487 (1991).

Answering Respondent's first special circumstances argument, the General Counsel argues that Respondent failed on this record to offer any evidence that there was any difficulty whatsoever respecting the wearing of the buttons among either employees or customers. Addressing Respondent's assertion that Respondent's rule is justified by its legitimate desire for a uniform employee appearance before the public, the General Counsel argues that no specific evidence was offered to support such a need. The General Counsel further asserts that Respondent's employees' appearance and the nature of their contact with the public does not justify such a prohibition citing *Burger King Corp*., 265 NLRB 1507 (1982). See also *Hertz Rent-A-Car*, 297 NLRB 363 (1989).

The General Counsel and Respondent also disagree respecting whether the wearing of the buttons was protected under the Act. The General Counsel relies on the case law holding the wearing of union buttons to be a Section 7 activity and therefore providing general protection to employees wearing such buttons, the timing of Respondent's prohibition wearing of the buttons, and his contentions respecting the disparate enforcement of the rule to establish protected conduct. Respondent cites *NLRB v. Harrah's Club*, 337 F.2d 177 (9th Cir. 1964), for the proposition that the button wearing of employees must be undertaken for a protected purpose and notes that in the instant case during the period in question unit employees were under a contract with at least 6 months remaining before its expiration date. Thus Respondent argues no protected activities took place. Respecting the ''Solidarity Works'' button, Respondent argues the button ''makes no reference to the negotiations which were about to begin and in no way identified the button as supporting the Meat Cutters' in their forthcoming negotiations'' (R. Br. at 17 fn. 17).

Finally, the General Counsel argues that Respondent has enforced the dress code in a disparate and discriminatory manner which independently renders the rule invalid. Respondent contests these factual assertions of the General Counsel.

3. Analysis

The various arguments of the parties noted in part above deserve separate consideration.

a. *The contention that Respondent's no button rule is fatally overboard*

Respondent's posted rule prohibits button wearing while ''on duty'' without further elaboration. No evidence was offered respecting either the division of employee time working in public and nonpublic areas of the facility nor of the circumstances of employee breaks and meal periods. There was no record contention made or evidence offered to support the proposition that there were any exceptions to or limitations on Respondent's agent's general instructions to employees not to wear union buttons. It appears that most employees were told to remove buttons during the time they were at work in public areas of the facility. The store manager on at least one occasion, however, told employees in the breakroom to remove pins they were wearing there.[5]

Respondent's rules does not on its face limit its prohibition of employee wearing of union buttons to public areas of its store. There is simply no geographical or locational limitation in the rule's reach. Nor did Respondent at any time either orally add such a limitation to its rule or limit its enforcement of the rule to employees working in public areas of the facility. I find the rule therefore applied unambiguously to both public and nonpublic areas of Respondent's store.[6]

The Board in *Albertsons, Inc*., 272 NLRB 865, held a union button prohibition fatally overboard and violative of Section 8(a)(1) of the Act because it improperly applied to nonselling as well as selling areas and because it applied to employee breaktime as well as times when employees were working. Based on that decision and the cases cited by the General Counsel in his argument on the issue quoted supra, I find that Respondent's rule is fatally overboard and therefore violates Section 8(a)(1) of the Act. It follows further, and I find, that all Respondent's agents' directions to employees to remove their union buttons and pins pursuant to the invalid rule also violate Section 8(a)(1) of the Act. *Saint Vincent's Hospital*, 265 NLRB 38 (1982).

b. *The contention that Respondent's no button rule is justified by special circumstances*

Given my findings that Respondent's rule prohibiting the wearing of union buttons is overboard and hence invalid, there is no further need to consider the validity of the rule as applied to selling areas or as applied to particular buttons. Reviewing authority may differ with my analysis, however, making it possible that this matter will be remanded for fur-

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[5] Store Manager Paper testified he saw Rockwell passing out ''Solidarity Works'' buttons to meat department employees. He testified as follows in the response to Respondent's representative Baruch's questions:

> Q. Did you say anything to anybody about it?
>
> A. I must clarify that it wasn't in the meat department. It was back by the smoke break room.
>
> Q. Okay. But the employees that [Rockwell] was handing the buttons to, were they meat department employees?
>
> A. Yes they were.
>
> Q. What, if anything, did you say to him about it, or the the employees?
>
> A. I had told the employees that they would have to remove them.
>
> Q. And what did they do.
>
> A. They removed them.

[6] Even were the rule as written and applied to be viewed as somehow ambiguous, the Board with court approval has long held that any limitation on employee exercise of Sec. 7 rights on company premises must be clear and ambiguous. As the Second Circuit has noted:

> [T]he risk of ambiguity must be held against the promulgator of the rule rather than the employees who are supposed to abide by it. [*NLRB v. Miller-Charles & Co*., 341 F.2d 870, 874 (2d Cir. 1965).]

See also *St. Joseph's Hospital*, 263 NLRB 375 (1982); *Presbyterian/St. Lukes Center v. NLRB*, 723 F.2d 1468 (10th Cir. 1983).

ther consideration of these issues. Further, a narrow holding that the rule is invalid because applied to nonselling areas, such as held in *Albertsons, Inc*., supra, may result in the rule thereafter being limited to public areas and thus simply invite further litigation respecting the unanswered issues presented. See for example the subsequent litigation of the same rule more narrowly applied in *Albertsons, Inc*., 300 NLRB 1013.

Accordingly, I shall consider the additional arguments of the parties respecting the validity of Respondent's no button policy, assuming for purposes of the analysis that the rule is not defeated by its application to nonselling or nonpublic areas and to employee break and meal periods.

(1) Respondent's employee dissention argument

As set forth, supra, Respondent argues that its button prohibition had the salutary effect of dampening employee dissent in the case of the ''Solidarity Works'' button. The evidence offered to support this argument was limited to the simple assertion that, given that only some employees wore the button and other employees did not, there was a difference of opinion between and among employees respecting the issue underlying the button. From this assertion Respondent argues that such differing employee opinions would be publicized and differences in views between employees exacerbated by the wearing of ''Solidarity Works'' pins which could in turn cause employee dissension. This risk and the fact that limiting button wearing diminishes or eliminates it, argues Respondent, independently justifies a prohibition of the ''Solidarity Works'' button and other union buttons.

The employer bears the affirmative burden of demonstrating the special circumstances advanced as justifying restrictions on employees' Section 7 rights. This burden extends to the demonstration that the buttons were provocative on their face or were reasonably likely to or did in fact cause diminution in employee discipline or decorum. *Virginia Electric & Power Co*., 260 NLRB 408 (1982).

Respondent's argument, while certainly ingenious, is not sustainable on this record. Thus I find that the slogan on the button, ''Solidarity Works,'' is not facially provocative and may not reasonably be expected to cause employee dissension, disruption, or other discipline problems justifying its prohibition. Respondent offered no evidence of actual disruption or other adverse effects at the facility. Accordingly, Respondent's argument here fails, *Nordstrom, Inc*., 264 NLRB 698 (1982).

(2) Respondent's argument that its uniform dress code justifies its button prohibition

Respondent argues that its employees are required to wear uniform clothing which presents a desirable and wholesome image to the public. One part of this uniform appearance policy is the restriction against any buttons or pins of any kind, trade union, or otherwise, unless approved by management. This policy, Respondent argues, augments the uniform, wholesome, professional appearance of its employees and therefore constitutes a legitimate business reason why it is entitled to prohibit its employees from wearing union buttons.

Setting aside the critical issues of when and where such a rule could be applied and, further, whether Respondent's dress code has been uniformly applied at relevant times, the question presented is whether, under Board law, Respondent's uniform appearance arguments rise to the level of a ''special circumstance'' sufficient on the facts of this case to justify a union button prohibition. That narrow question is considered below.

(a) *Case law on employee appearance as a special circumstance or business justification for prohibiting employee wearing of union insignia or buttons*

The Board in *Floridan Hotel of Tampa*, 137 NLRB 1484 (1962), enfd. as modified on other grounds 318 F.2d 545 (5th Cir. 1963), specifically held that the fact that employees come into contact with customers of the employer does not, standing alone, rise to the level of a special consideration justifying employer prohibition of employees wearing union buttons. In *Harrah's Club*, 143 NLRB 1356 (1963), the Board found the employer violated Section 8(a)(1) of the Act by prohibiting the wearing of small neat and inconspicuous union buttons on the uniforms of waiters in a world class theater-restaurant even where the prohibition applied to all jewelry and was part of a longstanding benignly initiated, rigorously and consistently applied appearance policy. The Ninth Circuit Court of Appeals denied enforcement of the Board's order, *NLRB v. Harrah's Club*, 337 F.2d 177 (1964), finding the wearing of a union button on the facts of that case not to be protected activity. The court further held that, even assuming the employees actions were protected, the Board had failed to balance those employee activities against the employer's right to maintain discipline. In this regard Judge Hamlin writing for the court held at 180:

> Most business establishments, particularly those which, like respondent, furnish services rather then goods, try to project a certain type of image to the public. One of the most essential elements in that image is the appearance of its uniformed employees who furnish that service in person to customers. The evidence shows that respondent has paid close attention to its public image by a uniform policy of long standing against the wearing of jewelry of any kind on the uniform. . . . This is a valid exercise of business judgment, and it is not the province of the Board or of this court to substitute its judgment for that of management so long as the exercise is reasonable and does not interfere with a protected purpose.

In *Pay'N Save Corp. v. NLRB*, 641 F.2d 697 (9th Cir. 1989), enfg. 247 NLRB 1346 (1980), the same court distinguished its earlier holding in *NLRB v. Harrah's Club*, supra, on the grounds that the button wearing at issue before it had a protected purpose unlike that in *Harrah's*. The court at 641 F.2d 701 noted that its earlier holding that the need for a consistent appearance of an employer's uniformed staff could justify prohibiting the wearing of buttons was dictum unnecessary to the decision of the case. The court went further, 641 F.2d at 701 fn. 10:

> [10] Moreover *Harrah's Club* would be distinguishable from the instant case even if wearing union buttons were a per se protected right without the need for a link with an otherwise protected purpose. For in *Harrah's* the court's dictum indicates that the strong employer in-

> terest in the image its employees presented to the public would outweigh the weak employee interest in wearing union insignia in the absence of any organizing or collective-bargaining activity. In our case the employee interest is much stronger, since an organizing drive was underway, and the employer's interest in employee appearance is much weaker, since Pay'N Save's clerks in their bright orange smocks have little in common with the service personnel of a casino/restaurant ''on a par with . . . the finest theater-restaurants in the world.'' 337 F.2d at 178 n. 1.

In subsequent cases the Board has more favorably considered employer's uniform appearance arguments. Thus in *United Parcel Service*, 195 NLRB 441, 441 fn. 2 (1972), the Board specifically noted the judge's finding that Respondent had a

> history of presenting to the customers and the general public its image of a neatly uniformed driver and the fact that this is an important part of Respondent's public image.

The appearance justification may also come into play where no employee uniforms are involved. Thus in *Davison-Paxon Co. v. NLRB*, 462 F.2d 364 (5th Cir. 1972), denying enf. to 191 NLRB 58 (1971), the court found a high fashion department store could prohibit the wearing of large gaudy union election buttons by its employees in selling areas during an organizing campaign when it permitted other less obtrusive and disruptive buttons to be worn. In *Nordstrom, Inc*., 264 NLRB 698 (1982), another high fashion department store employer was held not privileged to prohibit the wearing of small, discrete union buttons bearing the designation ''steward'' by employees in selling area.

In *Burger King Corp*., 265 NLRB 1507 (1982), the Board, reversing the judge below, found that an employer's prohibition of small union buttons was violative of the Act and rejected the argument that simple customer contact by uniformed employees does not justify employer prohibition of small unobtrusive buttons simply to achieve a neat standard appearance. The Sixth Circuit of the court of appeals denied enforcement of the decision in *Burger King Corp. v. NLRB*, 725 F.2d 1053 (6th Cir. 1984), holding broadly that employers whose employees wear uniforms in dealing with the public may prohibit those employees in a consistent and nondiscriminatory way from wearing union buttons.

The Board and Sixth Circuit remain of different views. The Board in *Page Avjet Corp*., 275 NLRB 773 (1985), and *Nemacolin Country Club*, 291 NLRB 456 (1988), has approved administrative law judge decisions noting that the Board has not acquiesced in the Sixth Circuit's holding in *Burger King*, supra. In *Hertz Rent-A-Car*, 297 NLRB 363 (1989), the Board again held that mere exposure to the public by uniformed employees is not a sufficient justification for banning union buttons. The Sixth Circuit in an unpublished decision denied enforcement and remanded the case to the Board. The Board in *Hertz Rent-A-Car*, 305 NLRB 487, accepted the court's remand as the ''law of the Case.''[7]

(b) *The interests to be balanced*

Given the authority cited, it follows that it is appropriate to balance the employees' rights to engage in Section 7 activities with the employer's rights under the particular facts presented to maintain proper discipline in the workplace. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 798–799 (1945).

(i) The nature and strength of employee's Section 7 right to wear the union button insignia at issue herein[8]

Respondent argues that the employees union button wearing activities at issue herein were not for any special purpose such as for organizational reasons or for purposes of obtaining better working conditions. Citing *NLRB v. Harrah's Club*, 337 F.2d 177 (9th Cir. 1964), Respondent argues the activities were unprotected. While it may be argued that subsequent cases in the Ninth Circuit, as cited and discussed, supra, have distanced themselves from the discussion in *Harrah's* of a necessary ''purpose'' to protected button wearing and that the Board has not acquiesced or adopted the concept, the context of employee button wearing deserves further consideration.

The four buttons, noted supra, involved herein were passed by the union business representative and others to both meatcutter unit employees and retail clerk unit employees during the time that meatcutter contract negotiations were either soon to begin or just underway. Were the retail clerk unit employees to support the collective-bargaining demands of the meatcutter employees, the latter's bargaining position would to some degree be enhanced. The store's meatcutter unit employees were therefore directly engaged in actions for their own mutual aid and protection and in support of collective-bargaining respecting their own terms and conditions of employment when they wore the pins touting the Union and the benefits of ''solidarity.'' This is clearly protected activity in support of collective-bargaining and noted as such in *Harrah's*, supra. Since the meatcutter unit employees were

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[7] Thus the Board declined to modify its general holdings as a result of the court's decision. Black's Law Dictionary (5th ed. 1979) defines the term ''law of the case'' in part as follows:

> Doctrine of ''Law of the Case'' provides that when appellate court has rendered a decision and states in its opinion a rule of law necessary to decision, that rule is to be followed in all subsequent proceedings in the same action.

In limiting its decision on remand to the law of the case, the Board specifically declines to reverse or modify its general holdings to the contrary. ''Law of the Case'' decisions do not represent the general position of the Board and are not binding authority on administrative law judges in cases other than the single specific case under discussion.

[8] As noted, supra, the cases frequently discuss the size and/or gaudy nature of particular pins which were prohibited by an employer who allowed other, smaller less gaudy pins to be worn by employees. This is not the case herein. Respondent did not argue that any particular pin was overly large or gaudy and for that reason should be prohibited, Further, the four pin types herein are simply neither large nor gaudy and include several which were highly inconspicuous, yet the wearing of each was prohibited by Respondent. The issues of size and color discussed in those decisions are therefore not a part of the instant case.

also asked by Respondent to remove their buttons pursuant to the dress code rule, Respondent's arguments that the retail clerk unit employees were engaged in activities too attenuated to be protected does not apply to the meatcutters.

The Union also encouraged the employees in the retail clerk unit to wear the distributed pins. Some did and were asked by Respondent to remove them pursuant to the dress code rule. The retail clerk unit employees, whose own contract negotiations were not then pending, were showing solidarity with the meatcutters by wearing the pins, especially the pin bearing the slogan ''Solidarity Works.'' Employee actions making common cause with or supporting other employees in other bargaining units or employed by other employers have long been regarded as protected concerted activity under the Act. The Board in *Boise Cascade Corp*., 300 NLRB 80 (1990), recently considered whether an employee wearing a button supporting employees on strike against another employer was engaged in protected concerted activity. In that case, Judge Robert A. Giannasi noted with Board approval at 82:

> By wearing the pin, which he had obtained from a sister local on strike against International Paper, another . . . . manufacturer in nearby Jay, Maine, [the employee] . . . . was making common cause with those employees in their dispute against International Paper. This type of activity is protected even though it relates to the working conditions of another employer. See *Eastex Inc. v. NLRB*, 437 U.S. 556, 564–565 (1978). As Judge Learned Hand observed long ago, employees making common cause with fellow employees of another employer are engaged in protected concerted activity because, even though ''the immediate quarrel does not itself concern them,'' the solidarity thus established assures them, if their ''turn ever comes,'' of the support of those ''whom they are all then helping.'' *NLRB v. Peter Cailler Kohler Swiss Chocolates Co*., 130 F.2d 503, 505–506 (2d Cir. 1942). Accordingly, I find that [the employer's agent's] conduct in barring the IP pin was violative of Section 8(a)(1) of the Act.

Surely the activities of the instant nonmeatcutter employees in showing ''solidarity'' with their fellow employee meatcutters are no less protected activity than those found in *Boise Cascade*. I so find. I find therefore that the activities of the employees wearing the buttons at issue herein were engaged in both direct support collective-bargaining and in actions for mutual aid protection. The Section 7 activities are direct and unattenuated.

Finally the activities at issue here necessarily include any and all possible protected activity expressible by means of a button or pin. This is so because Respondent's rule prohibits all union and other buttons irrespective of their content or the underlying employee or union cause or grievance.

(ii) Respondent's uniform appearance argument on its facts[9]

Under the cases cited supra, it is appropriate to consider Respondent's employee appearance policy as applied by it to determine the extent to which union buttons may be inconsistent with or destructive of that policy.

While the record is not replete with details of Respondent's store's operations, it is sufficient to support a finding that Respondent's store is a large retail grocery store of the modern variety offering a broad range of grocery and related items for sale. There is no suggestion that Respondent's operations differ significantly from those of large modern grocery stores generally or that its employees has been assigned or assumed duties and responsibilities different from those in such other grocery stores.

Respondent implicitly sells services as well as goods and may properly aspire to distinguish its grocery stores and enhance their reputation and therefore their products' sales and general marketability by the appearance of its employees. I find that Respondent's dress code is a legitimate part of Respondent's attempt to improve the public's impression of its overall operations. Without detracting from any of the above, however, I also find that Respondent's business does not traditionally require nor does its uniform dress policy establish the degree of rigor in appearance uniformity those of certain other industries and employers.

The aprons and smocks of Respondent's cashiers, clerks, and meatcutters worn over employee selected white shirts, dark slacks, and shoes are simply not the equivalent of traditional uniforms in the sense of distinctive clothing intended to identify the wearer as member of a certain organization or group. Thus, the employee appearance produced by conformity to Respondent's dress code does not rise to the level of the liveries and uniforms of the world class restaurants or United Parcel Services drivers either in appearance or in tradition. As the Ninth Circuit noted in *Pay'N Save Corp. v. NLRB*, 641 F.2d 697 (9th Cir. 1989), a store clerk's bright apron does not match the formal attire of a maitre d'hotel in either the importance of appearance or the need for meticulous uniformity.

Further, the court in *NLRB v. Harrah's Club*, 337 F.2d 177 (9th Cir. 1964), as quoted supra, noted that a uniform public image of an employer's employees is more important to the providers of services rather than to providers of goods. Respondent, however distinguished its service, is primarily a purveyor of groceries and related items at retail. Again under the cases, such enterprises have a lesser interest in minutely controlling the appearance of their employees.

The Board cases cited and discussed, supra, which find a substantial justification for restricting employee public wearing of union buttons involve much more formal and standardized apparel or appearance and occur in industries where such standardized service is a very important or critical element of the service offered for sale. A grocery store, even if its employees wear standardized aprons and smocks over

[9] As Respondent notes under the Sixth Circuit cases, cited supra, the very existence of a uniform policy for employees exposed to the public is a sufficient business justification to admit restrictions on union buttons. Under those cases, this further analysis would not be necessary. To the extent Respondent relies on the Sixth Circuit's rejection of the Board's position, it may simply be said that I am bound to follow current Board law unless and until it is overturned by the Supreme Court or the Board.

Respondent's citation of the Board's decision in *Hertz Rent-A-Car*, 305 NLRB 487, for the proposition that the Board now agrees with the Sixth Circuit's holdings in this area is not correct since, as noted supra, the Board in *Hertz* specifically asserts the court's ruling stands only as ''the law of the case,'' 305 NLRB at 488.

employee selected clothing of standardized color and type is not such a business.

As noted, supra, the Sixth Circuit is contrary, the Ninth Circuit in *Harrah's Club*, the Fifth Circuit in *Davison-Paxon Co. v. NLRB*, while not allowing the Board to limit restrictions on large gaudy or electioneering buttons did not rule on the smaller buttons at issue here.

As noted, the Ninth Circuit in *Pay'N Save*, supra, sustained the Board's decision disallowing regulation of employee buttons in a case involving an employer engaged, as in the instant case, in the retail sale of goods rather than services.

Thus, Respondent's arguments that it has legitimate, strong, and compelling interest in controlling employee appearance are weakened by the nature and traditions of grocery store operations in our culture and the lack of record evidence suggesting that Respondent's store operations significantly differ from such operations. Respondent's claims for the need for prohibition of union pins as part of its uniform appearance policy is further undermined by its admitted policy of encouraging employees to wear buttons, pins, and slogans which advertise products currently being promoted by Respondent.

Respondent's argument is further weakened by the fact that it does not in actuality maintain a uniform appearance of its employees free from various buttons and pins bearing slogans or other sales messages. Thus, Respondent's asserted need to keep a discrete union service button from being used as an employee's tie tack to sustain a uniform employee appearance is seemingly diminished if the employee or other employees are simultaneously wearing various product promotional pins, logos, or slogans. So, too, Respondent's allowing the wearing of personally selected seasonal pins and emblems and the occasional authorized button or insignia discussed, supra, undermines Respondent's argument that uniform employee appearance and image requirements justify restrictions on selling floor or public area employees wearing union insignia or union buttons.

(c) *Analysis and conclusions regarding Respondent's uniform appearance policy as a special consideration justifying prohibition of union button*

Based on the cases cited above and the record evidence of the nature of Respondent's operations, and further putting the burden on Respondent to justify its prohibition of employee protected activities, I find that there is insufficient evidence to support a finding that Respondent's uniform appearance policy is a special circumstance justifying promulgation and maintenance of a general rule against employee wearing of union buttons or insignia even were such a rule limited to selling or public area of Respondent's store.

More specifically, I do not find that Respondent's industry or the manner it has operated its store provides a sufficient justification for prohibiting employee wearing union buttons. Thus, I find that neither the operations of a grocery store generally nor the manner in which Respondent operates its store, including its appearance requirements described above, is so rigorous or sensitive that the Board would sustain a finding of business justification allowing prohibition of employee wearing of buttons even in public areas.

I further find on the facts of this case, the wearing of the union buttons or insignia at issue herein would not reasonably detract from the appearance of Respondent's store employees which Respondent has created and maintained at relevant times. This latter finding is strengthened by the fact that Respondent's uniform appearance policy respecting it employees has at all times allowed and encouraged various slogans and pins to be worn promoting commercial products.

Simply put, Respondent's public appearance arguments in support of a general union button prohibition as described above are legally insufficient under the cases to overbalance the right of employees to act in common cause for mutual aid and protection and in furtherance of collective bargaining by wearing union buttons. Respondent's directions that employees remove their union buttons therefore violates Section 8(a)(1) of the Act. *Hertz Rent-A-Car*, 297 NLRB 363; *Burger King Corp*., 265 NLRB 1507; *Albertsons, Inc*., 300 NLRB 1013; *Nordstrom, Inc*., 264 NLRB 698.[10] Further Respondent's dress code rule regarding preapproval of union buttons also violates the Act, *Middletown Hospital Assn*., 282 NLRB 541, 552–553 (1986). Further, Respondent's dress code rule requiring preapproval of union buttons also violates Section 8(a)(1) of the Act. *Middletown Hospital Assn*., supra.

4. Summary and conclusions

I have that Respondent's dress code no union button or insignia rule impermissibly prohibits employees from wearing union buttons and insignia in both nonpublic area and during nonworking time. The entire rule is thus fatally overboard and its maintenance, publication, and enforcement violates Section 8(a)(1) of the Act. Consistent with this finding, I further find that Respondent's directions to employees in both public and nonpublic areas and both on worktime and breaktime to remove union buttons and insignia pursuant to this invalid rule independently violate Section 8(a)(1) of the Act.

In order to avoid the possibility of a remand should reviewing authority differ with my conclusion that the rule fails in its entirely because of its overbreadth, I have also considered the rule's validity irrespective of its applicability to nonpublic areas and employees' break and lunch periods. I have further concluded that Respondent's business operations and the policy and practices it has maintained respecting the appearance of its employees are not sufficient to sustain its burden of showing special circumstances which justify a general prohibition of the wearing of union buttons and insignia by its employees. Thus, I have found Respondent's no button rule invalid and violative of Section 8(a)(1) of the Act even were it limited to public areas and working times.

IV. REMEDY

Having found the Respondent engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Consistent with the teachings of *Albertsons, Inc*., 300 NLRB 1013, 1013 fn.

[10] Inasmuch as I have found that Respondent's uniform appearance argument is insufficient to sustain its ban on all unapproved pins including union buttons, even if consistently and vigorously enforced, I need not and shall not resolve the disputed testimony respecting whether Respondent uniformly applied and enforced its no pin policy.

2, the remedy directed herein shall be coextensive with Respondent's application of its union button prohibition rule.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[11]

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act by engaging in the following acts and conduct:

(a) Maintaining, applying, and enforcing a dress code which requires employer approval of all employee pins and buttons, and therefore prohibits the wearing of unapproved union insignia and union buttons in all areas of Respondent's stores.

(b) Requiring employees to remove union buttons and insignia pursuant to its employee dress code rule.

4. The unfair labor practices described above are unfair labor practices affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

ORDER

The Respondent, Raley's Inc., Fairfield, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining, publicizing, applying, and enforcing its employee dress code rule requiring employer approval of employee buttons and pins and which prohibits the wearing of unapproved union insignia and union buttons, in public and nonpublic areas.

(b) Telling employees to remove union buttons and insignia pursuant to the employee dress code.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the National Labor Relations Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Amend Respondent's employee dress code to rescind that portion which bans the wearing of all but approved union buttons and insignia.

(b) Distribute and publicize the amended employee dress code and its removal of limitations on employees' rights to wear union buttons and insignia to the same extent the employee dress code has previously been publicized and distributed among employees at any facility where the rule has been applied.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Fairfield, California facility, and all other facilities where Respondent's December 14, 1988 dress code or any subsequent dress code explanation or modification which bans the wearing of unapproved union buttons and insignia has been maintained and enforced copies of the attached notice marked ''Appendix.''[12] Copies of the notice, on forms provided by the Regional Director for Region 20, in English and such additional languages as the Regional Director determines are necessary to fully communicate with employees, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[11] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[12] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

One of the rights guaranteed to employees by Section 7 of the National Labor Relations Act is the right to wear union buttons or insignia free from employee prohibition or restriction absent special circumstances requiring such regulation for the preservation of discipline in their establishments.

WE WILL NOT maintain a dress code requiring employer approval of or prohibiting employees from wearing trade union insignia or union buttons.

WE WILL NOT order employees to remove union insignia or buttons pursuant to such a dress code.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them in Section 7 of the National Labor Relations Act.

WE WILL amend our employee dress code to delete our restriction on employee's rights to wear unapproved union buttons or insignia.

WE WILL post or otherwise publicize our amended dress code wherever our previous dress code was posted or publicized and will post this notice in each of our grocery stores where that improper dress code was maintained.

RALEY'S INC.